Nos.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 221

JOSEPH COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 224

JOSEPH JOHN CANNELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Costello Pet. App. 17-36; Cannella Pet. App. 15-34) is reported at 255 F. 2d 389.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1958 (Costello Pet. App. 36; Cannella Pet.

App. 34). A joint petition for rehearing was denied on June 27, 1958. Costello's petition for a writ of certiorari was filed on July 25, 1958, and Cannella's petition was filed on July 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

A. Both petitioners raise the following questions:

1. Whether statutory as well as common law burglary is within the purview of the Federal Firearms Act, which prohibits interstate transportation of firearms by any person who has been convicted of a "crime of violence," and which lists burglary as such a crime.

2. Whether it was error to deny a motion to suppress as evidence a revolver which a state court found had been illegally seized by state officers, where (a) there was no federal participation in the search and seizure and, (b), petitioners received concurrent sentences on another count not based on this evidence.

3. Whether, in view of the fact that both petitioners testified in their own behalf and had prior felony convictions, the court erred in instructing that a witness could be impeached by reason of a prior felony conviction, and that the jury might disregard testimony of an impeached witness unless corroborated by other evidence, but could not consider the fact of a former conviction with respect to the principal issues raised by the indictment.

B. Joseph Costello (No. 221) raises, in addition, the following question:

4. Whether the court abused its discretion in denying a motion for a severance.

C. Joseph Cannella (No. 224) raises the following additional questions:

5. Whether his grand jury testimony tending to show knowledge of his codefendant's previous conviction of a crime of violence was admissible, where prior to such testimony the government attorney had warned him of his constitutional right against self-incrimination.

6. Whether the court abused its discretion, in refusing to order his testimony on the occasion of a previous appearance before the grand jury produced for inspection.

7. Whether the evidence was sufficient to prove his knowledge that his codefendant had previously been convicted of a crime of violence.

STATUTES INVOLVED

The Federal Firearms Act of June 30, 1938, 52 Stat. 1250, 1251, provided:

> Section 1 [15 U.S.C. 901]:
>
> * * * * *
>
> (6) The term "crime of violence" means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.
>
> * * * * *
>
> Section 2 [15 U.S.C. 902]:
>
> * * * * *
>
> (e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence or who is a fugutive [*sic*] from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugutive [*sic*] from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.

18 U.S.C. 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

In a four-count indictment returned in the United States District Court for the Eastern District of Missouri, count 1 charged petitioners Costello and Cannella with illegally transporting a revolver, serial number 68897, in interstate commerce on December 22, 1955 in violation of 15 U.S.C. 902(e) and 18 U.S.C. 2 (*supra*, pp. 3, 4); Costello having previously been convicted of burglary in a Missouri court (R. 1). Count 3 charged the illegal receipt of this revolver by Costello in violation of 15 U.S.C. 902(f) (*supra*, p. 4) (R. 2). Count 2 was identical with count 1, except that it involved a different revolver, serial number 65965 (R. 1-2). Count 4 was a conspiracy charge in which the overt act

alleged was Cannella's obtaining these two revolvers on December 22, 1955 (R. 2-3). Petitioners were found guilty on all counts (R. 328). Costello was sentenced to concurrent terms of imprisonment for 30 months on each of the four counts (R. 335-336). Cannella was sentenced to concurrent terms of imprisonment for 18 months on counts 1, 2, and 4 (R. 337-338). On appeal (R. 338-341), both convictions were unanimously affirmed (Costello Pet. App. 36; Cannella Pet. App. 34).

Pertinent evidence may be summarized as follows:

1. Costello, president of the Ace Cab Company, lived in St. Louis, Missouri. Cannella was a cab driver and supervisor for this company (R. 223-224, 210).

A judgment in the Circuit Court of St. Francois County, Missouri, dated February 29, 1936, disclosed that Costello had been found guilty of "Burglary and Larceny as charged in the information" and sentenced to two years' imprisonment in the Missouri penitentiary (R. 59-60). Costello admitted this conviction (R. 228).

2. In the early part of 1955, Costello asked one Arnold, a gun collector, where he could get a .38 caliber Smith & Wesson Terrier, and Arnold referred him to a gun dealer named Lewis in Granite City, Illinois (R. 67-68). When Costello and Cannella went to Lewis' shop, they spoke to him on the subject of "guns." On another occasion, Cannella came to the shop and ordered three guns (R. 105, 110). Cannella left with Lewis a notation of the Ace Cab Company telephone number, at which number Lewis was to telephone him, asking for "Joe", when the ordered guns were received. Lewis telephoned the Ace Cab Company, asked for the "Joe" who knew Lewis in Granite City, and reported, "Well,

I got what you ordered" (R. 109, 112). On December 22, 1955, at Lewis' shop, Cannella picked up three guns with serial numbers 65965, 69436, and 68897 and paid $178.80 (R. 106, 109, 111, 112). Cannella signed a fictitious name ("Joe Overbeck") and address on the dealer's register when he received the guns (R. 110, 112). The three guns were introduced in evidence at the trial over petitioners' objection (R. 111, 112).

3. Gov. Ex. 4 (the gun involved in count 2) was found in the possession of one Klaich, who had once seen a gun in Costello's desk drawer, and said he would like to have such a gun for protection of his tavern. Cannella contacted Klaich, received $70 from him, and later delivered the gun to him (R. 114-115).

Gov. Ex. 6 (the gun involved in counts 1, 3) was found fully loaded in the locked glove compartment of the Cadillac driven by Costello when he was arrested by the St. Louis police on February 27, 1956. Costello denied having a key for the glove compartment, but it was opened with a key in Costello's possession at the time of his arrest (R. 125, 127-129, 130-131, 136, 138.) The Circuit Court of the City of St. Louis, in a case arising out of this same arrest, in which Costello was charged with carrying a concealed weapon, ruled that the search of his automobile was illegal and ordered that evidence obtained by this search and seizure should be suppressed (R. 32-39). In the instant case, defense motions, both before and during the trial, to suppress evidence obtained in the search of Costello's car, were overruled (R. 4-9, 28-42, 111-112, 138-139, 344). There was no showing that any federal officer took part in the search (R. 39, 41).

4. Cannella was interviewed at the St. Louis offices of the F.B.I. on April 10, 1956 (R. 149). At first, he

gave an oral statement to the effect that he had purchased three guns from Lewis in December 1955; had placed the guns in the Ace Cab Company safe; had borrowed Costello's Cadillac to attend the wedding of his (Cannella's) niece; had transferred the guns to the glove compartment of the Cadillac with the intention of taking them to his home; had forgotten about the guns; and that on the next day Costello said that the guns which Cannella left in the glove compartment had gotten him (Costello) in trouble (R. 160-162). After an F.B.I. agent checked the marriage records and told Cannella that the date of his niece's marriage was October 15, 1955 (not in December), he admitted that he had related an "incorrect story" (R. 162-164).

Cannella then gave the F.B.I. a written statement which was introduced in evidence as to Cannella only (R. 155-158, 164). The substance of this statement was that Cannella, at Costello's direction and with money furnished by Costello, had bought the guns from Earl Lewis' shop in Granite City, Illinois; transported them in interstate commerce from Illinois to Costello's Ace Cab Company office in St. Louis, Missouri; and delivered them to Costello. The F.B.I. agent who took Cannella's written statement testified, over objection by both petitioners, that after furnishing the statement, Cannella expressed fear that it would come to Costello's attention that he had provided this information. This testimony was also limited to Cannella only (R. 165, 166).

5. In order to show Cannella's knowledge that Costello had previously been convicted of a "crime of violence" under 15 U.S.C. 901(6) (*supra*, p. 3), the government introduced in evidence, over objection, testimony by Cannella on April 23, 1956 before the grand

jury which returned the indictment (R. 76-81). This grand jury testimony was to the effect that shortly after Cannella began working for the Ace Cab Company in 1949 he heard as a matter of general reputation that Costello had been convicted of some crime and had served time in prison. He testified that he did not know the exact nature of the crime (R. 79, 80, 81). When told that it was in the newspaper that Costello had a record of burglary conviction, Cannella, although admitting that he did read the papers, answered "I didn't pay too much attention; I haven't got that much education" (R. 83, 87).

Both petitioners testified in their own defense. Costello denied all of the charges in the indictment (R. 226-227). Cannella denied that he bought the guns at Costello's request or with Costello's money. He testified that his signed statement to the F.B.I. was not true since he was sick when it was given (R. 214). He testified that he knew "Costello had been in jail but [he] did not know for what" (R. 214).

ARGUMENT

1. Both petitioners contend that the term "burglary" as used in Section 1(6) of the Federal Firearms Act, 15 U.S.C. 901(6) (*supra*, p. 3) is limited to common law burglary which is the breaking and entering in the night-time of another's dwelling house with intent to commit a felony therein. They attempted to prove at the trial that Costello's Missouri conviction was for second degree burglary, based on the breaking and entering of a jewelry store with intent to steal (see R. 267-270), a crime which lacked the dwelling-house and night-time elements of common law burglary (Costello Pet. 8-10; Cannella Pet. 10-11).

The highly restrictive interpretation of the statute for which petitioners contend is unreasonable. While criminal statutes are to be strictly construed, this does not mean that they must be given the "narrowest possible meaning in complete disregard of the purpose of the legislature." *United States* v. *Bramblett,* 348 U.S. 503, 509-510. The purpose of Congress in the enactment of the Federal Firearms Act was to "protect the public by preventing the transportation and possession of firearms and ammunition by those who, by their past conduct, had demonstrated their unfitness to be entrusted with such dangerous instrumentalities." *Cases* v. *United States,* 131 F. 2d 916, 921 (C.A. 1), certiorari denied, 319 U.S. 770; *Braswell* v. *United States,* 224 F. 2d 706, 710 (C.A. 10), certiorari denied, 350 U.S. 845. The burglary for which Costello had been convicted was clearly a crime of violence, even though the entry was not into a dwelling-house. *United States* v. *Kelly,* 146 F. Supp. 747, 752-753 (D. Colo.), reversed on other grounds, 246 F. 2d 864 (C.A. 10).

As the court below pointed out, at the time of passage of the Act in 1938, the law of burglary had developed in practically all states to include not only common law but statutory burglary (Costello Pet. App. 22). The listing of burglary in the statute as a crime of violence is therefore reasonably interpreted as applying to the crime of burglary as it was then generally defined—which would include breaking into a store.

2. Physical possession of the gun, the transportation and receipt of which formed the basis of the counts 1 and 3, was obtained by state officers, without federal participation, in a search which the state court found to be illegal, suppressing the gun as evidence in the state courts. The federal court, in overuling the mo-

tion to suppress, presumably relied on the fact that no federal officer participated in the undertaking, since it made no independent finding that the search was justified (R. 41, 138-139). The Court of Appeals also based its affirmation on this ground. Petitioners ask this Court to reconsider the ruling that evidence resulting from a search not participated in by federal officers is not subject to suppression in federal courts.

Resolution of this issue is not, however, necessary for a disposition of this case. The gun which formed the basis of count 2 was not the subject of a motion to suppress. And since petitioners received concurrent sentences on all counts, count 2 alone will support the verdict. *United States* v. *Sheridan*, 329 U.S. 379, 381; *Pinkerton* v. *United States*, 328 U.S. 640, 641; *Hirabayashi* v. *United States*, 320 U.S. 81, 84. Even as to counts 1 and 3, the physical introduction of the gun in evidence was not the major part of the evidence of the crimes charged—the transportation and receipt of the gun. The testimony of Lewis was the evidence which showed the purchase of the guns and their interstate transportation at the instance of Costello, with the assistance of Cannella. The gun itself was not a major factor. Accordingly, we think that there is no occasion to reach the issue presented by the motion to suppress which relates to counts 1 and 3.

If, however, the Court should deem the issue appropriate for resolution, we submit that the ruling of the court below is correct. Evidence obtained by state officers without federal participation has been recognized as admissible in federal prosecutions ever since the federal rule of exclusion was first formulated. *Weeks* v. *United States*, 232 U. S. 383, 398; *Byars* v. *United States*, 273 U.S. 28, 33; *Lustig* v. *United States*,

338 U.S. 74, 78-79; *Gaitan* v. *United States*, 252 F. 2d 256, 258-259 (C.A. 10), certiorari denied, 356 U.S. 937 (see the Government's brief in opposition in that case, No. 843, O.T. 1957). The facts that here the state has a rule of exclusion, and that the evidence was actually excluded by a state court, do not change this principle. As the Ninth Circuit ruled with respect to a similar contention in *Rios* v. *United States*, decided May 26, 1958, petition for certiorari pending, No. 40 Misc., this Term,[1] there is "no reason why the same rule should not be applied where the determination that the evidence was illegally seized by state or local authorities is made by a state trial court. The 'silver platter' doctrine operates on the assumption that the illegality of the state seizure has been established. How it has been established is immaterial."

The federal courts are not and should not be concerned with disciplining state officers. So long as federal officers are not involved, the federal courts may properly receive evidence which proves a violation of federal law. It is not part of the federal court's jurisdiction or province to correct state officers.

3. Both petitioners took the stand and both had been convicted of a felony (R. 59-60, 281-283). They complain of the court's charge (R. 317) that a witness might be impeached by showing a felony conviction and leaving the jury at liberty to disregard the entire testimony of an impeached witness unless corroborated by other evidence (Costello Pet. 15-16; Cannella Pet. 12-13).

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[1] As pointed out in the Government's brief in opposition in *Rios*, this issue is only tangentially involved in that case since there the court made an independent finding that the search was reasonable.

The charge was, however, the usual one relating to credibility of witnesses, and was correct. Cf. *United States* v. *Guertler*, 147 F. 2d 796, 797 (C.A. 2), certiorari denied, 325 U.S. 879; *Kean* v. *National City Bank*, 12 F. 2d 203, 204 (C.A. 6); *Magidson* v. *Duggan*, 212 F. 2d 748, 759 (C.A. 8). It left the jury "at liberty to disregard" testimony of an impeached witness, but it did not compel such disregard. To the contrary, it permitted acceptance of "such portion of the testimony of such witness who has been impeached * * * as you believe to be true and credible."

The jury was further instructed (R. 319-320):

> Evidence has been introduced that Joseph John Cannella has a prior conviction for violation of the liquor laws of the State of Missouri.
>
> In this respect, I charge you as a matter of law that this conviction is not a crime of violence within the meaning of the Federal Firearms Act and should not be considered by you in determining the guilt or innocence of defendants, but may only be considered for the purpose of determining the credibility of Cannella as a witness.
>
> Evidence has been introduced that defendant Costello has had a prior conviction of the offense of burglary. Evidence of this prior conviction may only be considered by you as bearing on the element of the prior conviction required for the crime charged. It should not be considered by you for any other purpose in determining his guilt of the offense charged.
>
> * * * * *
>
> Evidence has been introduced that defendant Costello has been formerly convicted of the crime

> of burglary. The issues as to whether or not he received, transported or shipped firearms in interstate commerce or conspired so to do should be considered by you solely and only upon the other evidence which is introduced before you at trial pertaining to those issues. The fact of a former conviction should be considered by the jury only as bearing upon the issue as to whether or not he has been convicted of a crime of violence within the meaning of the statute and for no other purpose. The fact of a former conviction should not be considered by you on the issues as to whether he received, transported or shipped firearms in interstate commerce or conspired so to do.

Thus, the instructions to the jury fully and accurately indicated the proper relevance of the prior convictions to the issues in the case and afforded petitioners the protection to which they were entitled. Their position was no different from that of any other defendant who, having a previous felony conviction, elects to testify.

4. Petitioner Costello argues that the court abused its discretion in denying his requests for a severance. It is said that the remarks made by Cammella after he executed his signed statement—that he was fearful that it would come to Costello's attention that he had provided information to the FBI (R. 165-166)—were so prejudicial that they warranted a severance and mistrial, despite cautionary instructions that these were not to be considered against Costello (Costello Pet. 12-15). The contention is without merit.

Throughout the trial and in its final charge, the court made clear to the jurors that, when evidence related to only one codefendant but was hearsay as to the other,

they should consider it only against the one to whom the evidence related (R. 63, 127, 130, 151, 155, 166, 274-275, 277, 284, 290, 318-319). Petitioners had different counsel and their separable interests were stressed. At the time Cannella's challenged remarks were introduced, the court stated that they could not be considered as evidence against Costello (R. 166), and in its final charge again made this explicitly clear (R. 319-320). In these circumstances, "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions." *Opper* v. *United States*, 348 U.S. 84, 95.

The issues involved were not so complex that the jury could not intelligently follow a joint trial. The two petitioners were closely associated in perpetrating the crimes charged and were properly joined as codefendants under Rule 8(b), F. R. Crim. P., as having "participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." There was no abuse of the court's discretion in refusing a severance. Cf. *Delli Paoli* v. *United States*, 352 U.S. 232, 243; *Kansas City Star Co.* v. *United States*, 240 F. 2d 643, 651-653 (C.A. 8), certiorari denied, 354 U.S. 923.

Neither did the court err in instructing the jurors (R. 311-312) that if, and only if, they found Costello guilty under counts 1 and 2, they should then consider whether Cannella aided and abetted Costello in commission of the offenses (Costello Pet. 14-15). In the particular circumstances, such an instruction hypothesizing interrelationship of guilt between the two

petitioners was unavoidable. Without Costello's prior conviction for burglary and without his complicity in the interstate movement of the revolvers, there were no federal crimes. In *United States* v. *Klass*, 166 F. 2d 373 (C.A. 3) (Costello Pet. 15), it was possible to find the guilt of several codefendants (the seller of a house as principal and the sales agents as aiders and abettors) independently, and therefore it was held to be error to link the defendants in the charge. That is not the situation here.

5. Petitioner Cannella was subpoenaed and testified before the grand jury on April 18 and April 23, 1956 (R. 18, 24, 26). The government attorney testified that at the April 18 appearance he did not question Cannella as a prospective defendant or consider that he was implicated in the charges contained in an indictment he had drafted naming Costello alone (R. 24-26, 22-23). The government attorney further testified, "It is a fair statement to say that after I heard Mr. Cannella's testimony he was joined as a defendant" (R. 26). Cannella was not warned on April 18, but on April 23, at the beginning of the testimony, this colloquy occurred (R. 78, 26):

> Q. [By government attorney]. Mr. Cannella, I believe I should tell you that you are not required to make any statement here that might tend to incriminate you. Do you understand that?
>
> A. Yes, sir.

During his April 23 appearance, Cannella gave testimony, later introduced over an objection at the trial, tending to show his knowledge that Costello had been convicted of a "crime of violence" (R. 76-81).

Cannella's contention is that his grand jury testimony showing knowledge of Costello's previous conviction was inadmissible, since he, as a "de facto" defendant, gave his testimony without being afforded sufficient warning of his constitutional right against self-incrimination (Cannella Pet. 8-10).

In *United States* v. *Scully*, 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897, it was held that the mere possibility that a witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment when subpoenaed to testify before a grand jury. See also *United States* v. *Klein*, 247 F. 2d 908, 920-921 (C.A. 2), certiorari denied, 355 U.S. 924. In *Scully*, the witness later indicted was given no warning as to his constitutional right against self-incrimination. Cannella, however, was warned specifically as to this right, and answered that he understood it before continuing with his testimony. There was no need for the government attorney to expand his warning by stating further that Cannella was considered a defendant and was himself under investigation, since the warning as worded carried this reasonable implication. Cannella was of course not entitled to counsel at the grand jury hearing, but if he had feared self-incrimination he could have requested an adjournment in order to consult counsel before deciding whether to continue his testimony. No pressure or coercion was employed against him to complete his testimony subsequent to the warning as to his rights, and he continued voluntarily. The result is that it cannot be said that his grand jury testimony was obtained in an improper manner.

6. The court made available to Cannella the transcript of his grand jury testimony on April 23, but denied production for inspection of his April 18 testi-

mony (R. 61-62, 76-77). Cannella asserts that the court abused its discretion in refusing production of the April 18 testimony, which he says might have explained the April 23 testimony (Cannella Pet. 11-12).

It is submitted, however, that Cannella failed to lay a proper foundation showing possible relevancy and materiality of the April 18 testimony to warrant invading the secrecy of the grand jury proceedings, and that the court did not abuse its discretion in refusing production of this testimony.[2] Cf. *Herzog* v. *United States*, 226 F. 2d 561, 566-567 (C.A. 9); *United States* v. *Alper*, 156 F. 2d 222, 226 (C.A. 2); *United States* v. *Nunan*, 236 F. 2d 576, 594 (C.A. 2), certiorari denied, 353 U.S. 912. In cases of perjury before a grand jury, relevancy of the grand jury testimony is obvious, but in a situation like the instant case the laying of a foundation showing possible relevancy is essential.

It is the merest conjecture to surmise now that Cannella's April 18 testimony might have shown that he was of the impression that Costello had been confined in prison for an offense which was not a crime of violence (Cannella Pet. 12). If this were true, Cannella would have testified to this effect when he took the stand in presentation of his own defense. He did not so testify.

7. Finally, petitioner Cannella contends that the evidence was insufficient to prove his knowledge that

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[2] This colloquy occurred when the government attorney was opposing production of the April 18 testimony (R. 77):

> Mr. Boecker: The ultimate fact is much of this is not relevant. We want to avoid just these side issues here. I should not be made to furnish the whole day's proceedings.
>
> "The Court: Objection overruled. Proceed."

See also R. 87-89.

Costello had previously been convicted of a crime of violence (Cannella Pet. 13-14).

This contention, fully considered and rejected by the court below and related solely to the particular facts of this ca presents no question which this Court need review. As the Court of Appeals properly observed (Cannella Pet. 33), "In this case Cannella's admission that he knew that Costello had a criminal record and had been imprisoned for crime, coupled with his conduct in giving a false name and address to the gun dealer and his attempt to cover up Costello's connection with the purchase and transportation of the guns by false statements to the officers, constitute circumstantial evidence of his guilty knowledge sufficient to support the verdict of the jury on the issue." No question is raised as to the instructions to the jury on this point. Proof of the requisite knowledge must generally rest upon circumstantial evidence and it was not error, in view of the evidence adduced, to permit the jury to resolve the issue.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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AUGUST 1958.

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